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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 367

W. C. JARRETT, L. DAVIES, W. E. JOCELYN, ET AL.,
Petitioners,

vs.

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a Corporation, also Known as Norfolk Housing Authority

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

Leigh B. Penn,
Counsel for Petitioners.

## INDEX


| | Page |
|---|---|
| Summary statement of the matter involved | 1 |
| Reasons relied on for the allowance of the writ | 2 |
| Jurisdiction | 5 |


AUTHORITIES


| | |
|---|---|
| Code of Virginia, Section 3145(9) | 4 |
| Contract with FPHA, Article III, Section 3.07 | 2 |
| Contract with FPHA, Articles V and VI | 3 |
| 169 Fed. 2d, page 409 (No. 4 Advance sheets) | 5 |
| 74 Federal Supplement 585 | 5 |
| Judicial Code, Section 274, paragraph (d) | 2 |
| Judicial Code as Amended, Sec. 274, paragraph (d) | 2 |
| USCA Title 28, Section 400 | 5 |
| USCA Title 40, Section 1401-1430 | 2, 5 |
| USCA Title 42, Sections 1501-1564 | 5 |
| USCA, Title 28, Section 344-350 | 5 |
| USCA, Title 42, Section 1504 | 3 |

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NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, A CORPORATION, ALSO KNOWN AS NORFOLK HOUSING AUTHORITY

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## PETITION FOR WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

The petition of W. C. Jarrett and others respectfully show to this Honorable Court:

### A

### Summary Statement of the Matter Involved

This case involves the Number One Current Problem of the nation—Public Housing:

(1) The rents to be charged, and

(2) Whether or not a housing authority must obtain the subsidy afforded by the government to make the rent "at the lowest possible rates." (Quotation from statute.)

The appellants (for the most part sailors, rank of Seamen to Chief Petty Officers), are tenants of Merrimack Park, a public housing project of approximately five hundred apartments, owned and operated by Norfolk Housing Authority, the appellee, which was built in 1941, through the financial means of the United States Government under the provisions of the United States Housing Act (42 U. S. C. A. 1401-1430).

In 1941, the Housing Authority fixed the rents.

On September 1st, 1945, the appellees increased the rent approximately fifty per cent.

On July 1, 1947, again the appellees increased the rent, substantially.

No increase in salary or income was granted the non-commissioned Naval military personnel who occupied the project with their wives and children, unlike the defense workers who made large incomes during the war by overtime work.

To the additional increases of rent (1945 and 1947) the sailors instituted proceedings to have declared the same as erroneous, under the declaratory judgment provision. (Section 274, paragraph (d) of the Judicial Code.)

B

**Reasons Relied On for the Allowance of the Writ**

1. This is a case of first impression in the United States, and of momentous concern.

2. That the local housing authority erroneously failed to comply with the formula provided for by the contract with Federal Public Housing Authority in violation of Article III, Section 3.07.

> "Sec. 3.07. Operation of Project Without Profit. The Local Authority covenants that the Project will not be

operated for profit and that it will fix the rentals for dwellings in the Project at rates sufficient, but no higher than sufficient, to produce Revenues which (together with the annual contributions provided for herein and all other available moneys) will be adequate (a) to provide for the payment, as the same become due, of the principal of and interest on the Bonds, (b) to meet Operating Expenses, and (c) to discharge any other obligations arising under this Contract or the Resolutions."

Also Article E.—Annual Contributions by FPHA.

"The FPHA hereby agrees to make annual contributions to the Local Authority during the period, in the amounts, in the manner, and subject to the provisions, set forth in the General Covenants and Conditions. For the purposes of said provisions one and three-tenths per centum (1.3%) shall be the 'Fixed Contribution Percentage'."

3. That the local housing authority erroneously failed to obtain the annual contributions provided for in the contract with the FPHA under Articles V and VI. (Pages 123 to 138 of the transcript of the record.)

4. That the intent and purpose of the fixing of rentals, when rented to sailors as the facts are here provided that the Navy Department fix the rentals, as provided in 42 U. S. C. A. 1504.

5. That the increased rentals will provide revenue sufficient to discharge all the costs of the project within twenty-five to thirty years in violation of the cardinal purpose to provide rent "at the lowest possible rates", with bonds whose maturity may not exceed sixty years. (Reference to pages 98 and 99 of the transcript of the record.)

6. That the Housing Authority, the appellee, is accountable to:

(1) Tenants,

(2) Bondholders,

(3) Citizens of Virginia and the United States of America, and the appellants have a privity of contract by reason of their special status, and the appreciation of the Government in adopting this legislation. No reserve can be had except as provided by statute which is as follows. (Sec. 3145(9) Code of Virginia:

> "(c) to create (during not less than the six years immediately succeeding its issuance of any bonds) a reserve sufficient to meet the largest principal and interest payments which will be due on such bonds in any one year thereafter and to maintain such reserve."

7. That under familiar principles, the appellees failed to provide such an answer as would entitle it to a summary judgment on the pleadings. Here—there is no showing that the Housing Authority in its answer has complied with the regulations or that it was operating without any profit, or that the proper reserve was deducted or that the certified statement indicates that the rent was "at the lowest possible rates".

8. Foremost for the consideration of this Court is the question of subsidy. Shall a Housing Authority be compelled to accept subsidy in Virginia and in New York State a subsidy shall not be necessary? The purpose of the statute was that the rental rates should be uniform throughout the country; the same in Virginia as in California—certainly the rate of pay of the enlisted men who rent in Virginia is the same as it is in California, in Maine or in Louisiana—the same allowances and the same rate of pay.

C

**Jurisdiction**

The date of the judgment to be reviewed is August 10th, 1948 and is reported in 169 Fed. 2d, page 409 (No. 4 Advance sheets) and 74 Federal Supplement 585. This Court has appellate jurisdiction by virtue of Title 28 U. S. C. A., Section 344-350.

D

The date of the judgment to be reviewed is August 10th, 1948 and jurisdiction of the court is presented under United States Housing Act, U. S. C. A. Title 42, Section 1401-1430, and Title 42, Sections 1501-1564. The procedure for a declaratory judgment is pursuant to Section 274, paragraph (d) of the Judicial Code as Amended, U. S. C. A. Title 28, Section 400.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 5742 W. C. Jarrett, et als., Appellants vs. Norfolk Redevelopment and Housing Authority, a Corporation, also known as Norfolk Housing Authority, Appellee, and that the said judgment of the United States Circuit Court of Appeals for the Fourth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the

premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

W. C. JARRETT, ET ALS.,
By LOUIS B. FINE,
*Counsel for Petitioners;*
*A Member of the Bar of the*
*Supreme Court of the United States.*

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948**

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NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, A CORPORATION, ALSO KNOWN AS NORFOLK HOUSING AUTHORITY

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

## INDEX


| | Page |
|---|---|
| The opinions of the Court below | 11 |
| Jurisdiction | 12 |
| Statement of the case | 12 |
| Specification of errors | 14 |
| Argument | 15 |
| Summary of the argument | 21 |
| Conclusion | 22 |


### Table of Citations

Cases:


| | |
|---|---|
| *Chandler* v. *Cutler-Hammer, Inc.*, D. C. Wis. 1940, 31 F. Supp. 451 | 21 |
| *Gibbs* v. *Buck*, Fla. 1939, 59 S. Ct. 725, 307 U. S. 66, 83 L. Ed. 1111 | 20 |
| *Hovenden* v. *City of Bristow*, D. C. Okl. 1940, 34 F. Supp. 674 | 20 |
| *Jacobs* v. *Peavy-Wilson Lumber Co.*, D. C. La. 1940, 33 F. Supp. 206 | 21 |
| *Lehigh Coal & Navigation Co.* v. *Central R. of New Jersey*, D. C. Pa. 1940, 33 F. Supp. 362 | 21 |


### Secondary Authorities


| | |
|---|---|
| Code of Virginia, Section 5768 | 17 |
| Code of Virginia, Section 3145, paragraph (1) | 13 |
| Code of Virginia, Section 3145, paragraph (8) | 15, 21 |
| Code of Virginia, Section 3145, paragraph (9) | 15, 17, 21 |
| Code of Virginia, Section 3145, paragraph (10) | 16 |
| Contract between appellee and FPHA, Section 204 | 18 |
| Contract between appellee and FPHA, Article III, Sec. 501 | 16, 22 |
| Judicial Code as Amended, Sec. 274, paragraph (d) | 12 |
| USCA, Title 24, Section 400 | 12 |
| USCA, Title 42, Section 1401-1430 | 12, 13 |
| USCA, Title 42, Section 1501-1564 | 12, 17 |

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### I

### The Opinions of the Court Below

The opinion in the United States Court of Appeals for the Fourth Circuit is reported in *W. C. Jarrett, et als., Appellants,* v. *Norfolk Redevelopment and Housing Authority, a Corporation, also known as Norfolk Housing Authority, Appellee,* and the opinion for the United States District Court is reported in 74 Federal Supplement 585, and the Circuit Court in 169 F. (2) 409 (No. 4 Advance Sheets).

## II

### Jurisdiction

1. The date of the judgment to be reviewed is August 10th, 1948.

2. The appellant respectfully represents that the lower court erred in entering a summary judgment directing the dismissal of their complaint.

3. The procedure for declaratory judgment is pursuant to Section 274, paragraph (d) of the Judicial Code as amended, USCA, Title 24, Section 400, and the jurisdiction of this court is presented under the United States Housing Act, USCA Title 42, Section 1401-1430, and Title 42, 1501-1564.

4. There are no adjudicated cases, but this section involves the construction of a "low rent housing" project (42 USCA 1401-1430) which was converted into a project for the housing of persons engaged in defense activities. 42 USCA 1501, *et seq.* This latter statute provides for this change of purpose. See 42 USCA 1504.

## III

### Statement of the Case

A partial statement of the case has already been given under the heading "A" in Petition for Writ of Certiorari, and in the interest of brevity, will not be repeated. The additional facts are as follows:

The facts necessarily are based on the pleadings filed in this action as no evidence *ore tenus* was heard by the court. A declaratory judgment was asked to determine whether two rent increases, to-wit: the July, 1945, increase, and a proposed increase of July 1st, 1947, are legal and proper.

There are approximately five hundred apartments, or family units built on a public housing project known as Merrimack Park. It is built on a tract of land just across the street from the East gate of the Naval Air Station in Norfolk. During the war and ever since completion of the project in 1941, occupancy of the Merrimack Park has been confined and limited to military personnel, most of whom are Naval personnel, and personnel who are non-commissioned officers, to-wit: from (the lowest grade) Seaman, to (the highest grade) Chief Petty Officers. The same tenants who have become veterans were permitted to remain on the premises.

The defendant corporation was organized pursuant to the Virginia Housing Authorities Law, Section 3145, paragraph (1), *et seq.*, of the Code of Virginia. The Virginia Housing Authorities Act of 1938 *(supra)* was passed pursuant to the United States Housing Act of 1937 (42 USCA, Section 1401 *et seq.*).

IV

The United States Housing Authority had its powers broadened in 1940 in connection with the ever increasing demand for the housing of persons engaged in national defense, and Section 1504 et seq. was passed by Congress (Title 42).

The appellee did obtain the financial assistance of the United States Government under the provision of the United States Housing Act (42 U. S. C. A. 1401-1430) and entered into a contract with the Federal Public Housing Authority by virtue of this financial assistance. The project, although originally intended for low rent housing as a part of the program of slum clearance, was converted immediately for tenants or persons engaged in defense activities as provided under the provisions of Title 42, U. S.

C. A., Section 1501, *et seq.* For this reason, Merrimack Park, by reason of the war, was tenanted by non-commissioned Naval personnel.

On September 1st, 1945 and on July 1st, 1947, the rents prevailing in the Merrimack Part project were raised substantially, to-wit; almost a total of ninety per cent since the original occupancy by the tenants. The appellants therefore contend that the appellees contravened the statute in raising the rents.

The appellee asserts it has sole and unrestricted discretion in all matters of administration of this project, including the fixing of rents, and that the tenants have no right to be heard or complain, and that this is entirely a matter between the appellee and the Federal Public Housing Administration (Page 48, Item 2, "Motion to Dismiss" Transcript of Record).

## IV

### Specification of Errors

1. The Circuit Court erred in affirming the judgment of the District Court in entering summary judgment directing the dismissal of the appellants complaint.

2. The lower court erred in not directing that the appellee be required to take advantage of the subsidy.

3. That under the pleadings in this case, the lower court erred in directing the summary judgment in that the answer of the appellee did not set forth facts and figures indicating that the project was not operated without profit, nor was any statement of receipts and expenditures appended thereto to justify the dismissal; that said answer merely provided for conclusions of law based upon no statement of facts or figures.

## V

### Argument

Section 3145, Paragraph (8), Code of Virginia (1942), provides *inter alia* that the appellee shall have the power "• • • Subject to the limitations contained in this chapter to establish and revise the rents or charges • • •." In the same chapter, under Section 3145(9), entitled "Operation not for profit":

> "It is hereby declared to be the policy of this Commonwealth that each housing authority shall manage and operate its housing projects in an efficient manner so as to enable it to fix the rentals for dwelling accommodations at the lowest possible rates consistent with such authority providing decent, safe and sanitary dwelling accommodations, and that no housing authority shall construct or operate any such project for profit, or as a source of revenue to the city or the county. To THIS END AN AUTHORITY SHALL FIX THE RENTALS FOR DWELLINGS IN ITS PROJECTS AT NO HIGHER RATES THAN IT SHALL FIND TO BE NECESSARY IN ORDER TO PRODUCE REVENUES, WHICH (TOGETHER WITH ALL OTHER AVAILABLE MONEYS, REVENUES, INCOME AND RECEIPTS OF THE AUTHORITY FROM WHATEVER SOURCES DERIVED) WILL BE SUFFICIENT (a) TO MEET THE COST OF, AND TO PROVIDE FOR, MAINTAINING AND OPERATING THE PROJECTS (INCLUDING THE COST OF ANY INSURANCE) AND THE ADMINISTRATIVE EXPENSES OF THE AUTHORITY: (b) TO PAY, AS THE SAME BECOME DUE, THE PRINCIPAL AND INTEREST ON THE BONDS OF THE AUTHORITY: AND (c) TO CREATE (DURING NOT LESS THAN THE SIX YEARS IMMEDIATELY SUCCEEDING ITS ISSUANCE OF ANY BONDS) A RESERVE SUFFICIENT TO MEET THE LARGEST PRINCIPAL AND INTEREST PAYMENTS WHICH WILL BE DUE ON SUCH BONDS IN ANY ONE YEAR THEREAFTER AND TO MAINTAIN SUCH RESERVE."

From this paragraph, it will be noted from a fair construction of the same, that the Housing Authority must operate its business:

(1) For the Housing Authority,

(2) For the bond holders,

(3) For the general public; that is, the City of Norfolk, Commonwealth of Virginia, and the United States of America, as well as the individual tenants.

Specifically, no reserve can be set up except as expressly provided in this section; to-wit; "* * * a reserve sufficient to meet the largest principal and interest payments which will be due on such bonds in any one year thereafter and to maintain such reserve."

Under Section 3145, Paragraph (10), the authority may rent the property to persons only of a low income, and not to accept any person whose aggregate annual income is in excess of five times the annual rental of the quarters, except that in the case of families with three or more minor dependents, such ratio shall not exceed six to one, and included in the rental shall be the annual cost of utilities. It therefore appears with unusual clarity that the appellee was compelled by operation of law to operate and establish rentals only on the basis of the hereinabove mentioned statutes.

The contract between the appellee and the Federal Public Housing Authority, specifically Article 3, Section 501, provides:

> "To assist the local authority in achieving, maintaining and assuring the low rent character of the project, the FPHA agrees, subject to the provisions hereinafter contained, to make annual contributions to the local authority."

Section 307 of the contract is as follows:

> "The local Authority covenants that the Project will not be operated for profit and that it will fix the rentals for dwellings in the Project at rates sufficient, but no

higher than sufficient, to produce revenues which (together with the annual contributions provided for herein and all other available moneys) will be adequate (a) to provide for the payment, as the same become due, of the principal of and interest on the Bonds, (b) to meet Operating Expenses, and (c) to discharge any other obligations arising under this Contract and the Resolutions."

This contract, it is respectfully submitted; is not merely a contract between the FPHA and the appellee. It is a contract made for the benefit of the tenants, and the tenants have a right to complaint of a breach of covenant in the contract between the appellee and the FPHA.

On the subject of "Contracts and Writing", Section 5768, Code of Virginia (1943), permits the beneficial owner of any contract to maintain an action in his own name. It is respectfully contended and urgently insisted that there is no discretion on the part of the defendant to fix its rentals. The rentals are fixed entirely pursuant to Section 3145(9) of the Code of Virginia (*supra*) and pursuant to the Federal statutes; not by virtue of any contract, discretion or voluntary action on the part of the appellee with the FPHA.

Under Title 42, U. S. C. A., Section 1504, entitled "Rental Rates; Exemption from Limitations of National Housing Act of 1937", in part provides:

"Any contract made for financial assistance under sections 1401-1430 of this title may be revised so as to provide that the project involved will be assisted for any of the purposes of sections 1501-1505 of this title. The Navy or War Department or the Authority, in the administration of any project developed for the purposes of sections 1501-1505 of this title, shall fix rentals for persons engaged in national defense activities and their families which will be within their financial reach, and the Authority, in any contract

for financial assistance or any lease of such a project, shall require the fixing of such rentals. * * *"

"* * * During the period when the President determines that in any locality there is an acute need for housing to assure the availability of dwellings for persons engaged in national defense activities, dwellings in a project developed or assisted in said locality which are devoted to the purposes of providing housing for persons engaged in national defense activities shall not be subject to subsections (1) and (2) of section 1402 of this title, and during such period such projects shall be deemed projects of a low-rent character for the purposes of any of the applicable provisions in Title I of the United States Housing Act of 1937. June 28, 1940, c. 440, Title II 204, 54 Stat. 683."

Reading this section, with Section 1402, it will be seen that the appellee had no right to fix the rental and in this particular case, the Navy Department, nor the War Department, nor the FPHA fixed the rental, but the appellee did so.

The appellee further contends that the Office of Price Administration had approved the raising of the rents and cite that if this approval was unfair or erroneous, that the exclusive remedy would only be to file a complaint with the Emergency Court of Appeals. To this contention, we respectfully submit that this is erroneous, when the very Act under the Office of Price Administration excludes specifically projects of this kind.

Under Section 204 of the contract between the appellee and the FPHA, amortization for the maturity of any bond is specifically stated not to exceed sixty years from the date of this contract.

A liberal and fair interpretation, consonant with the Act, would necessarily mean that a project of this kind should not be paid for any quicker or earlier than had to be under the provisions of the law, and if an outside limit of

sixty years was placed thereon with the idea of giving the people the lowest possible rent, then would it not be inconsistent and strange to say that the project could be paid for in fifteen years or twenty years, and still call it low rental property.

It is respectfully submitted that it is the duty of the appellee to show that its accounting did not exceed the amount of reserve, expenditures, income and revenue which were all set up as provided under Section 3145, Paragraph (9) of the Code of Virginia, and that there was no discretion on the part of the appellee. It was required to follow the plan as best suited the people consistent with the plan of financing set forth by the Statute of Virginia and the Federal Government.

It is significant to bring to the attention of this Honorable Court that there is nothing in the record, to-wit; the answer, the motion to dismiss and summary judgment, to indicate the necessity at the time for the increase of the rental and the bonds had never been issued for any increase in interest or principal, but that the appellees might do so or would probably do so. In the meantime, upon probability and possibility, and without any authority in law, the rents were raised and in defiance and in opposition of "the lowest possible rents consistent with providing decent, safe and sanitary dwelling accomodations." Section 3145(9).

Under Section 3145(10), Code of Virginia, the statute requires the tenants to pay rentals "within their financial reach". It is to be further observed that in 1945 when the rentals of the Seaman and the Navy man up to the Chief Petty Officer were increased, his allowance was not increased by the United States Government, and again in 1947 when the appellee again raised the rent of the Seaman and the Chief Petty Officer, he did not receive any increase in allowances or pay. Are they not entitled to special

consideration for the service to their country? Was not the law passed to take care of this very situation? Was not the Navy Department required to fix the increased rentals? Is the contract between the appellee and the FPHA subject only to action to be taken by either one of those parties, or was the contract passed for the benefit of the enlisted men?

The sustaining of the motion to dismiss, we respectfully urge, constituted error. The statement by the appellee that it was doing what the law stated, was a conclusion of law and certainly not a statement of fact. It was incumbent in their answer to definitely show an operation statement:

1. That the project was not operated for profit,

2. That only sufficient reserve was held as prescribed by the statute,

3. Statement which could be analyzed that would indicate that it had received the subsidy,

4. That after receiving the subsidy, that the project was rented at the "lowest possible rates". This requirement of a balance sheet is required under Rule 12, Paragraph (c) on Motion for Judgment on the Pleadings.

In *Gibbs* v. *Buck*, Fla. 1939, 59 S. Ct. 725, 307 U. S. 66, 83 L. Ed. 1111:

> "A motion to dismiss bill in injunction suit attacking constitutionality of a state statute on ground that cause of action is not stated should be denied if factual allegations raise grave doubt of constitutionality of statute in mind of trial court."

In *Hovenden* v. *City of Bristow*, D.C. Okl. 1940, 34 F. Supp. 674:

"On motion to dismiss complaint, all inferences must be resolved against the movant."

In *Lehigh Coal & Navigation Co.* v. *Central R. of New Jersey*, D. C. Pa. 1940, 33 F. Supp. 362:

"A motion to dismiss is limited to allegations of complaint, and on such a motion, which is equivalent of a demurrer, the court is called upon to interpret the allegations and to accept all such allegations as true and to determine whether the complaint presents a cause of action."

In *Jacobs* v. *Peavy-Wilson Lumber Co.*, D. C. La. 1940, 33 F. Supp. 206:

"In action for injunction against violation of section 201 *et seq.* of Title 29, Labor, wherein motion to dismiss on ground of unconstitutionality of the act and of its administrative enforcement was based on numerous grounds, each of which might be sufficient to sustain the motion if substantiated by evidence and not left to factual conjecture, motion to dismiss would be denied without prejudice and referred to the merits."

In *Chandler* v. *Cutler-Hammer, Inc.*, D. C. Wis. 1940, 31 F. Supp. 451:

"Judgment should not be granted on the pleadings if there is any question of fact involved."

We earnestly contend there was a question of fact under the pleadings in this case as to the justification of the increase of rents.

## Summary of the Argument

Point A. The appellee has no discretion except to carry out the mandatory terms of the statute under Section 3145, Paragraph (8), Code of Virginia (1942), and Section 3145, Paragraph (9) entitled "Operation Not For Profit."

Point B. That the appellee was compelled to obtain the subsidy as provided in the contract between the Federal Public Housing Authority, and specifically Article 3, Section 501.

Point C. The appellee was compelled to rent the project at rentals only sufficient to provide principal and interest, operating expenses, and other obligations for a period not to exceed sixty years.

Point D. The answer of the appellee did not justify a dismissal on a motion on the pleadings because the answer of the appellee stated conclusions of law and not facts or figures. (No operating statement attached to the answer.)

## Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise of this Court of its supervisory powers, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals, Fourth Circuit, and finally reverse it.

Respectfully submitted,

LOUIS B. FINE,
*Counsel for Petitioner.*